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Wallace Oscar Boyd v. Commonwealth of Kentucky

Supplemental Brief 1976-SC-0392

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SUPPLEMENTAL BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-392

WALLACE OSCAR BOYD — APPELLANT

VS. APPEAL FROM GREENUP CIRCUIT COURT
HON. OSCAR SAMMONS, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

SUPPLEMENTAL BRIEF FOR APPELLANT

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I hereby certify that a copy of the foregoing Supplemental Brief for Appellant has been mailed to the Hon. Oscar Sammons, Judge, Greenup Circuit Court, Greenup County Courthouse, Greenup, Kentucky 41144; the Hon. Jack R. Kibbey, Commonwealth's Attorney, 20th Judicial District, Greenup County Courthouse, Greenup, Kentucky 41144; and the Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 3rd day of September, 1976.

Larry H. Marshall

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SUPREME COURT OF KENTUCKY

FILE NO. 76-392

WALLACE OSCAR BOYD — APPELLANT

VS. APPEAL FROM GREENUP CIRCUIT COURT
HON. OSCAR SAMMONS, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

* * * * * * * * * * * * * * * * * * *

MAY IT PLEASE THE COURT:

STATEMENT OF THE QUESTION PRESENTED

DOES THE IMPOSITION AND INFLICTION OF THE SENTENCE OF DEATH BY ELECTROCUTION FOR THE CRIME OF MURDER RESULTING IN MULTIPLE DEATHS VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE SEVENTEENTH SECTION OF THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY?

ARGUMENT

THE IMPOSITION AND INFLICTION OF THE MANDATORY SENTENCE OF DEATH BY ELECTROCUTION FOR THE CRIME OF MURDER RESULTING IN MULTIPLE DEATHS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE SEVENTEENTH SECTION OF THE CONSTITUTION OF THE COMMONWEALTH OF KENTUCKY.

On November 25, 1975, appellant made a Motion to Quash Indictment (Transcript of Record, hereinafter designated T.R., p. 71-74). The grounds of this Motion were that the punishment of death was unconstitutional in that it amounted to cruel and unusual punishment, and the procedures used to impose the mandatory sentence of death by electrocution were unconstitutional. (Id.). This Motion was supported by a sixteen (16) page memorandum of law.

The Greenup Circuit Court overruled this Motion on December 1, 1975, and the defendant objected to this ruling (T.R., p. 91).

Appellant, in this action, questions the constitutionality of the imposition and the carrying out of a mandatory sentence of death by electrocution.

A

THE DEATH SENTENCE IMPOSED ON APPELLANT UNDER THIS COMMONWEALTH'S MANDATORY DEATH SENTENCE STATUTE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

On June 29, 1972, the Supreme Court of the United States in the case of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), in effect, invalidated all of the death penalty statutes then extant in the different jurisdictions of this nation. This Commonwealth's death penalty statute did not survive that decision. See Williams v. Kentucky, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 759 (1972).

Legislatures throughout the United States immediately attempted to reenact statutory schemes for the imposition and infliction of the death penalty that would not run afoul of the Furman decision or the Eighth and Fourteenth Amendments. Two basic approaches were utilized in an effort to avoid the problem of imbuing the sentencing authority with unfettered discretion in the selection of persons to be subjected to the death penalty - a problem which had led to the infliction of the ultimate punishment in an arbitrary and capricious manner. The first approach attempted to address the concerns expressed by the Supreme Court in Furman by legislatively specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence. The second approach made the death penalty mandatory for specified crimes. This Commonwealth chose the second approach.[1]

---

[1] This Commonwealth's pertinent capital sentence statutes are as follows:

> 507.020 Murder
>
> (1) A person is guilty of murder when:
> (a) With intent to cause the death of another person, he causes the death of such person or of a third person;
>
> . . .

The United States Supreme Court was recently called on to determine whether or not either of these two approaches complied with Furman and comported with the Eighth and Fourteenth Amendments to the United States Constitution.

In the cases styled Gregg v. Georgia, 428 U.S. ____, 96 S.Ct. 2909, 48 L.Ed.2d _____(1976), Jurek v. Texas, 428 U.S. _____, 96 S.Ct. 2950, 48 L.Ed.2d _____(1976), and Proffitt v. Florida, 428 U.S. _____, 96 S.Ct. 2960, 48 L.Ed.2d _____(1976), the Supreme Court upheld those capital punishment statutes which elected the approach of specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence.

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[1](Continued)

> (b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.
> (2) Murder is a Class A felony, except that in the following situations it is a capital offense:
> (a) The defendant's act of killing was intentional and was for profit or hire;
> (b) The defendant's act of killing was intentional, and occurred during the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree;
> (c) The defendant's act of killing was intentional and the defendant was a prisoner and the victim was a prison employe engaged at the time of the act in the performance of his duties;
> (d) The defendant's act of killing was intentional and the death was caused through use of a destructive device, as defined in KRS 237.030(1);
> (e) The defendant's act or acts of killing were intentional and resulted in multiple deaths; or
> (f) The defendant's act of killing was intentional and the victim was a police officer, sheriff or deputy sheriff engaged at the time of the act in the lawful performance of his duties.

However, the Supreme Court, in two 5-4 decisions, struck down as violative of the Eighth and Fourteenth Amendments those statutes which made the death penalty mandatory for specified crimes. See Woodson v. North Carolina, 428 U.S. _____, 96 S.Ct. 2978, 48 L.Ed.2d _____(1976), and Roberts v. Louisiana, 428 U.S. _____, 96 S.Ct. 3001, 48 L.Ed.2d _____ (1976). Some four days later the Supreme Court in light of the latter two cases struck down the mandatory death penalty statutes of Oklahoma finding that "[t]he imposition and carrying out of the death penalty under the laws of Oklahoma constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Williams v. Oklahoma, _____U.S. _____, 96 S.Ct. 3218, _____L.Ed.2d _____(1976).

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[1](Continued)

509.040 Kidnapping

(1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
(a) To hold him for ransom or reward; or
(b) To accomplish or to advance the commission of a felony; or
(c) To inflict bodily injury or to terrorize the victim or another; or
(d) To interfere with the performance of a governmental or political function; or
(e) To use him as a shield or hostage.
(2) Kidnapping is a capital offense unless the defendant voluntarily releases the victim alive, substantially unharmed, and in a safe place prior to trial, in which case it is a Class B felony.

532.030 Authorized dispositions; generally

(1) When a person is convicted of a capital offense he shall have his punishment fixed at death. (Emphasis supplied).

The Legislature, this year, amended KRS 507.020(2) to include a mandatory penalty of death for a murder perpetrated during the commission of sodomy in the first degree and for an intentional murder when the defendant and the victim were both criminals (Kentucky Acts Chap 1 83 § 1 (1976)).

Appellant submits that since the Kentucky legislature attempted to answer the concerns expressed in Furman by enacting a mandatory death penalty scheme and since the enacted scheme is virtually identical to those struck down by the Supreme Court in Woodson, Roberts, and Williams, all supra, then the imposition and infliction of a death sentence under this Commonwealth's death penalty statutes constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

The state of North Carolina responded to Furman by making death the mandatory sentence for all persons convicted of murder in the first degree.[2] Woodson and his codefendant, Waxton, were convicted of first degree murder for mortally wounding a cashier of a food store during an armed robbery and, pursuant to the mandatory provisions of the death penalty statute, were sentenced to die.

Woodson argued initially that the imposition of the death penalty under any circumstances is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The Supreme Court rejected that contention in light of their holding in Gregg v. Georgia, supra, 96 S.Ct. at 2922-2932.

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[2] North Carolina's first degree murder statute reads as follows:

> Murder in the first. . .degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony shall be deemed to be murder in the first degree and shall be punished with death. N.C. Gen.Stat. § 14-17 (Cu.Supp. 1975).

Woodson's argument that the procedures for imposing and carrying out the death penalty in North Carolina were violative of the Eighth and Fourteenth Amendments, found acceptance with the Court. Stating in Woodson, supra, 96 S.Ct. at 2990, that "the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society,'" the plurality opinion of Mr. Justice Stewart, Mr. Justice Powell and Mr. Justice Stevens (Mr. Justice Brennan and Mr. Justice Marshall maintained the position they took in Furman that the Eighth and Fourteenth Amendments prohibit the taking of any defendant's life) was quick to observe that "one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense." Id. Accordingly, the plurality specifically held that "North Carolina's mandatory death penalty statute for first degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be exercised within the limits of civilized standards.'" Id., 96 S.Ct. at 2990.

The Supreme Court did not stop there in their assault on North Carolina's mandatory scheme. Recognizing the fact that "American juries have persistently refused to convict a significant portion of persons charged with first degree murder. . . under mandatory death penalty statutes," the plurality of the Court condemned North Carolina's failure to provide "standards to guide the jury in its inevitable exercise of the power to determine which first degree murderers shall live and which shall die." Id., 96 S.Ct. at 2991. Consequently, the Court held that a mandatory sentencing scheme is violative of Furman

since it fails to replace "arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable[3] the process for imposing a sentence of death." Id.

Finally, and perhaps most importantly the plurality of Justices struck down North Carolina's mandatory death penalty scheme because of "its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Id. The plurality properly acknowledged:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailities of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. Id.

In accordance with this analysis, the Supreme Court specifically held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment. . .requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id., 96 S.Ct. at 2991.

Not unexpectedly, the imposition of the death penalty on Woodson and Waxton was found to be in violation of the Eighth

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[3] The same plurality of justices made it abundantly clear in Gregg v. Georgia, supra, 96 S.Ct. at 2939-2940, that a necessary part of any constitutionally valid death penalty scheme must include some provision for meaningful appellate review to insure that no penalty of death is imposed in an arbitrary and capricious manner.

and Fourteenth Amendments. Id., 96 S.Ct. at 2992.

The state of Louisiana likewise responded to the dictates of Furman by enacting a mandatory death penalty scheme.[4] Louisiana's scheme is virtually indistinguishable from the one implemented in this Commonwealth in response to Furman (see fn. 1, supra).

Roberts was convicted of first degree murder for his actions of shooting a gas station attendant four times in the head during an armed robbery. As required by the mandatory provisions of the Louisiana statutes, the trial judge sentenced Roberts to die.

Although recognizing that Louisiana's statute presented a variation on the mandatory scheme employed by North Carolina, the United States Supreme Court ultimately found that statute to be equally violative of the Eighth and Fourteenth Amendments:

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[4]Louisiana's first degree murder statute provides as follows:

> First degree murder. First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon a fireman or a peace officer who was engaged in the performance of his lawful duties; or
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

. . .

> That Louisiana has adopted a different and somewhat narrower definition of first degree murder than North Carolina is not of controlling constitutional significance. The history of mandatory death penalty statutes indicates a firm societal view that limiting the scope of capital murder is an inadequate response to the harshness and inflexibility of a mandatory death sentence statute.
>
> . . .
>
> The constitutional vice of mandatory death sentence statutes-lack of focus on the circumstances of the particular offense and the character and propensities of the offender-is not resolved by Louisiana limitation of first degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute. Even the other more narrowly drawn categories of first degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender. Roberts v. Louisiana, supra, 96 S.Ct. at 3006 (emphasis added).

The Supreme Court further found the particular statute in question to be unconstitutional because Louisiana, like North Carolina, not only failed to provide standards "to guide the jury in the exercise of its power to select those first degree murderers who will receive death sentences," but also failed to provide for "meaningful appellate review of the jury's decision." Id., 96 S.Ct. at 3007.

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[4](Continued)

> "Whoever commits the crime of first degree murder shall be punished by death." La.Rev. Stat.Ann. § 14.30 (1974).

In 1975, this statute was amended to include the crime of aggravated burglary as a predicate felony for first degree murder. La. Acts 1975, No. 327.

In view of the inherent deficiencies in that statutory scheme, the Supreme Court specifically found that "the death sentence imposed upon [Roberts] under Louisiana's mandatory death sentence violates the Eighth and Fourteenth Amendments and must be set aside." Id., 96 S.Ct. at 3008.

Four days following the rendering of the above mentioned decisions, the United States Supreme Court struck down Oklahoma's mandatory death penalty statute in light of Woodson and Roberts. Williams v. Oklahoma, supra. The statutory scheme struck down in Oklahoma made death the mandatory sentence when an intentional murder occurred during any of ten separate situations. Interestingly, every provision of this Commonwealth's mandatory death penalty statute for murder in effect when appellant was convicted is specifically found in Oklahoma's unconstitutional statute.[5]

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[5]Oklahoma's unconstitutional mandatory death penalty statute is found below. Those provisions that are the same as or similar to Kentucky's are underscored.

> § 701.1 Murder in the first degree
>
> Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or any other human being, is murder in the first degree in the following cases:
>
> 1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties; (Same as KRS 507.020(2)(c) and (f)).
>
> 2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years; (Same as KRS 507.020(2)(b)).
>
> 3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

In light of these recent Supreme Court pronouncements, the South Carolina Supreme Court has struck down its mandatory death penalty scheme. See State v. Rumsey, S.C., _____S.E.2d_____ (Opinion No. 20263; filed July 21, 1976). South Carolina's mandatory scheme is markedly similar to the statutory provisions of this jurisdiction.[6]

These foregoing constitutional precedents dictate that this Commonwealth's mandatory death penalty statutes not only fail to comply with Furman, but also fail to comport with the Eighth and Fourteenth Amendments.

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[5](Continued)

> 4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;
>
> 5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;
>
> 6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing; (Same as KRS 507.020(2)(a)).
>
> 7. Murder by a person under a sentence of life imprisonment in the penitentiary; (Similar to KRS 507.020(a)(c)).
>
> 8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location; (Same as KRS 507.020(2)(e)).
>
> 9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and
>
> 10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive. (Same as KRS 507.020(2)(d)), 21 O.S. 1973 § 701.1.

[6]South Carolina's mandatory scheme is as follows:

> § 16-52. Punishment for murder.—Whoever is guilty of murder under the following circumstances shall

Initially, the state legislature in mandating that death be the only punishment for a conviction of the crime of murder during the commission of a first degree burglary, has departed "markedly from contemporary standards respecting the imposition of the punishment of death and thus [the imposition and the carrying out of this punishment for that crime cannot be done] consistently with the Eighth and Fourteenth Amendments' requirement that [this] State's power to punish 'be exercised within the limits of civilized standards.'" Woodson v. North Carolina, supra, 96 S.Ct. at 2990.

Secondly, in light of the general agreement that in a mandatory scheme juries persistently refuse to convict a significant portion of defendants charged with a capital crime, this Commonwealth's refusal to provide standards to guide the jury in its inevitable exercise of the power to determine which capital criminal shall live and which shall die invites arbitrary

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[6](Continued)

> suffer the penalty of death:
>
> (1) Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.
> (2) Murder committed for hire based on some consideration of value.
> (3) Murder of a law-enforcement officer or correctional officer while acting in the line of duty.
> (4) The person convicted of committing the murder had previously been convicted of murder, or was convicted of committing more than one murder.
> (5) Murder that is willful, deliberate and premeditated. S.C.Stat. § 16.52 (1975 Supplement).

and capricious selectivity and thus inherently does not comport with the Eighth and Fourteenth Amendments. Id., 96 S.Ct. at 2991. This defect plus the fact that there is no provision under this Commonwealth's mandatory scheme for appellate courts to check this arbitrary and capricious exercise of that life and death power make it readily apparent that this jurisdiction's mandatory death scheme fails to comply with the dictates of Furman and Gregg, both supra, that arbitrary and wanton jury discretion be replaced "with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, supra, 96 S.Ct. at 2991.

Finally, and perhaps most offensively, this Commonwealth's mandatory death penalty scheme fails to allow for the particularized consideration of all the relevant aspects of the character of each convicted defendant before the imposition of the ultimate punishment. As such it excludes from the jury's consideration all the possible "compassionate or mitigating factors stemming from the diverse frailities of humankind." Id. Such an approach is abhorrent to the United States Constitution because "[i]t treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Id. Since Kentucky's mandatory death penalty scheme does not allow the jury to consider "the character and the record of the individual offender" and since such consideration is "a constitutionally indispensable part of the process of inflicting the penalty of death," this Court, in accordance with Woodson, supra, must strike down any death penalty imposed under such an unconstitutional system.

In sum, this Commonwealth's death penalty statutes, unlike those of Georgia, Florida and Texas, do not minimize the risk that the death penalty will be arbitrarily imposed on a

capriciously selected group of offenders; this is because Kentucky's capital offense provisions require a mandatory death sentence for all persons convicted of a designated offense and because they totally fail to guide the decision to impose a death sentence with reasonable standards that a jury could use to focus on the particularized circumstances of the crime and the defendant. Gregg v. Georgia, supra, 96 S.Ct. at 2936.

The death penalty under which appellant now stands convicted was imposed under a statutory scheme that has been and is proscribed by the "limits of civilized standards." Woodson v. North Carolina, supra, 96 S.Ct. at 2990. As such, it cannot be carried out since it undeniably violates the Eighth and Fourteenth Amendments to the United States Constitution. Accordingly, appellant's mandatory death sentence for his conviction of murder resulting in multiple deaths cannot constitutionally stand. Therefore, this Court must reverse the judgment against appellant which imposes the penalty of death for the crime of committing an intentional murder resulting in multiple deaths, and must remand this case to the Greenup Circuit Court with directions to afford appellant a new trial untainted by the possibility of a sentence of death.

B

THE IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH VIOLATES THE COMMONWEALTH OF KENTUCKY'S PROHIBITION AGAINST CRUEL PUNISHMENT.

Section Seventeen of this Commonwealth's Constitution specifically prohibits the infliction of "cruel punishment." Appellant submits that the imposition and execution of a sentence of death is proscribed by that provision of this state's constitution.

It is beyond dispute that this Court has "the power to declare a penalty unconstitutional if it clearly and manifestly appears to be so." Workman v. Commonwealth, Ky., 429 S.W.2d 374, 377 (1968). As this Court correctly emphasized in Workman, the determination of whether or not the penalty of death is cruel punishment and thus manifestly unconstitutional must be made in light of "the continual development of society." Id.

This Court has promulgated three separate and distinct tests for resolving the important issue of whether a certain punishment is prohibited by Section Seventeen. Under the first test, a punishment is excessively cruel if "in view of all the circumstances the punishment in question is of such character as to shock the general conscience and to violate the principles of fundamental fairness." Id., at 378. The next criterion "pits the offense against the punishment and if they are found to be greatly disproportionate, then the punishment becomes cruel and unusual." Id. The final test asks the question "does the punishment go beyond what is necessary to achieve the aim of the public intent as expressed by the legislative act?" Id. If the punishment in question falls when scrutinized under any of these tests, then the punishment is prohibited by Section Seventeen of the Constitution of the Commonwealth of Kentucky.

(1)

THE PUNISHMENT OF DEATH SHOCKS THE GENERAL CONSCIENCE AND VIOLATES THE PRINCIPLES OF FUNDAMENTAL FAIRNESS

It is beyond cavil that mankind's most fundamental right is the right to life. This nation's birth and existence was and is predicated upon that right: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence (July 4, 1776) (emphasis supplied).

This right to life has spawned the growth and sophistication of ceaseless attempts to prolong the life of every living person. Diseases that were once deemed "terminal" can now be treated and controlled because of man's dedication to the preservation of human life. Innumerable resources are constantly poured into every type of scientific research that is dedicated to making obsolete the phrase "terminal illness." The reason such efforts are universally supported is obvious; every human being is cognizant of the fact that life is the most sacred right and possession of every living person.

In light of this universal obsession with the preservation of mankind's most sacred right, it is indeed incongruous that the legislature of this Commonwealth chose to facilitate the deprivation of this right to a certain class of people.

It cannot be denied that "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity." Furman v. Georgia, supra, 408 U.S. at 290 (concurring opinion of Mr. Justice Brennan). Indeed the defendant who is to be executed must be viewed in a different light from his non-capital compatriots in crime.

> An individual [sentenced to] prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'" Id.

Certainly, this Commonwealth has not evolved to a point in its "civilization" where it is willing to say to any person that "[y]ou are not fit for this world"? America's penal system has long passed the time when retribution was the only end served. Rehabilitating the anti-social criminal has been the ultimate aim of this system for some time. That goal reflects a concept of elemental decency basic to any civilized society. However, "[k]illing convicted criminals is utterly inconsistent with rehabilitation, and the death penalty obviously negates and utterly frustrates any interest the Commonwealth has in that ultimate goal." Commonwealth v. O'Neal, Mass., 339 N.E.2d 676, 681 n.11 (1975). Viewed from this perspective, it is readily apparent that this atavistic punishment "is of such character as to shock the general conscience." Workman v. Commonwealth, supra.

The imposition and infliction of the penalty of death also flies in the face of this nation's concepts of elemental decency because it is so inherently severe and cruel:

> Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of flogging as a constitutionally permissible punishment, Jackson v. Bishop, 404 F.2d 571 (CA8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. Ex parte Medley, 134 U.S. 160, 172, 33 L.Ed. 835, 480, 10 S.Ct. 384 (1890). As the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal. 3d 628, 649, 493 P.2d 880, 894 (1972). Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." Solesbee v. Balkcom, 339 U.S. 9, 14, 94 L.Ed. 604, 608, 70 S.Ct. 457 (1950) (dissenting opinion). The "fate of ever-increasing fear and distress" to which the expatriate is subjected, Trop v. Dulles, 356 U.S., at 102, 2 L.Ed.2d at 643, can only exist to a greater degree for a person confined in prison awaiting death. Furman v. Georgia, supra, 408 U.S. at 287-289 (per Justice Brennan's concurrence).

The intentional taking of a defendant's life is undoubtedly proscribed by Kentucky's constitutional ban on cruel and unusual punishment because this penalty is of such a character that it should shock the general conscience. Justice Marshall of the United States Supreme Court has emphatically noted that if the American people were fully informed as to the purpose of the death penalty and its liabilities, they would reject it as morally unacceptable. Furman v. Georgia, supra, 408 U.S. at 361 (concurring opinion); Gregg v. Georgia, supra, 96 S.Ct. at 2971 (dissenting opinion). Accordingly, such a punishment is fundamentally unfair and is thus prohibited by Section Seventeen of the Constitution of the Commonwealth of Kentucky.

(2)

THE SENTENCE OF DEATH IS SO DISPROPORTIONATE TO A CONVICTION FOR ANY CRIME THAT IT CONSTITUTES CRUEL PUNISHMENT.

As established supra, the penalty of death for the commission of any crime is so severe, so final, and so brutalizing that it is undoubtedly the type of punishment proscribed by Section Seventeen of the Constitution of this Commonwealth. The sanction of death is an absolute and abhorrent denial of the humanity of a person, who, but for his or her inability to control certain aspects of his or her behavior, is no different than any other person.

The question that naturally arises in cases such as this is what to do with people who, for various and sundry reasons, intentionally take the life of some innocent person. Those who favor execution are strangely clamoring for the now universally repudiated adage, "an eye for an eye." This is perplexing because never is heard a cry for dismembering the right arm of a defendant who has intentionally dismembered the

right arm of an innocent victim. To the civilized world such a penalty would be cruel punishment. Consequently, a term of years is deemed an appropriate punishment for the maiming of another's arm. Paradoxically, while the various jurisdictions of this nation have universally rejected dismemberment or disfigurement as a permissible penal sanction, certain jurisdictions still deem it appropriate to take the life of one who has murdered another.

It is apparent that in every situation where a victim is brutally beaten or dismembered and survives, the people of this nation will not tolerate any call for a punishment that mirrors the nature of the crime. However, in capital cases, for some undisclosed reason, the atavistic "eye for an eye" is resurrected from the burial grounds of rejected brutality and used to sanction the taking of a life. This sanctioned murder, "far from offering redress for the offense committed against society, adds instead a second defilement to the first." A. Camus, Reflections on the Guillotine, pp. 5-6 (Fredjof-Karla Pub. 1960).

In view of this nation's rejection of like or similar punishment for brutal, yet non-deadly intentional assaults, it is obvious that the assessment of a penalty of death is grossly disproportionate to the commission of crime of intentional homicide. As such, the death penalty is proscribed by the cruel punishment clause of Section Seventeen of the Constitution of the Commonwealth of Kentucky. Workman v. Commonwealth, supra.

(3)

THE SENTENCE OF DEATH IS CRUEL BECAUSE IT EXCEEDS ANY LEGITIMATE PENAL AIM.

In resolving this immediate issue this Court must resolve whether or not the punishment of death "goes beyond what is necessary to achieve the aim of the public intent as expressed by the legislative act." Workman v. Commonwealth, supra.

It is logical to assume that the Commonwealth will argue that the imposition and execution of the death penalty achieves the following aims: 1) deterrence; 2) protection of law abiding citizens from crimes of violence; and 3) retribution.

In regards to deterrence, appellant acknowledges that all penal sanctions should convey a deterrent effect. However, since the death penalty, the most unique punishment, must withstand a challenge based on Section Seventeen of Kentucky's constitution, the question to be answered by this Court is not simply whether capital punishment is a deterrent, but whether drastic punishment is needed in order to achieve the deterrence desired. Id.

Chief Justice Tauro of the Massachusetts Supreme Court in Commonwealth v. O'Neal, supra, answers this question in the negative:

> Despite the most exhaustive research by noted experts in the field, there is simply no convincing evidence that the death penalty is a deterrent superior to lesser punishments. In fact, the most convincing studies point in the opposite direction. Id., at 682.

On a crude statistical scale, this latter point seems to be borne out by the Kentucky experience. Kentucky's intentional homicide rate since 1970, as reported in Crime in Kentucky, has been as follows:

YEAR	NO. OF INTENTIONAL HOMICIDES
1970	335
1971	352
1972	323
1973	320
1974	345
1975	351

Interestingly, the highest incidence of intentional homicides occurred during those years when the death penalty was available, 1971 and 1975. The lowest number of intentional homicides during the last six years, occurred in 1973, the first full year after Furman was decided. In summary this crude statistical scale reveals that the experience in Kentucky supports Chief Justice Tauro's conclusion that the death penalty is not a meaningful deterrent.

Because of the exhaustive and well reasoned discussion by Chief Justice Tauro on this topic, appellant will simply direct this Court's attention to his opinion in Commonwealth v. O'Neal, supra, 339 N.E.2d at pp. 682-685. A more persuasive refutation of the deterrent effect of the death penalty, as contrasted with a term of years imprisonment, cannot be found.

Undeniably, the death penalty, like any other penal sanction, has some sort of deterrent effect. However, as shown above, death serves no better, arguably even less, a deterrent than a term of imprisonment. Consequently, the death penalty exceeds what is necessary to achieve the deterrent aim of the homicide statutes. As such, the contention that the death penalty acts as a deterrent cannot, in any way, support an argument that capital punishment is not proscribed by the constitution of this jurisdiction.

The second "legitimate penal aim" which could be advanced by the Commonwealth is that the death penalty must be retained to stop convicted murderers from committing similar violent crimes in the future. Mr. Justice Brennan refuted

this assertion in Furman, supra, at 300-301:

> The sufficient answer to this is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole law can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined.

Additionally, it must be emphasized that "murderers in general have been shown to be among the least recidivistic of offenders." Packer, The Limits of the Criminal Sanction, p. 52 (1968). As noted by Chief Justice Tauro:

> It is true that in the Eighteenth and early Nineteenth Centuries, before creation of an effective prison system, the death penalty was considered necessary for the protection of society. See Bedau, The Courts, the Constitution, and Capital Punishment, 1968 Utah L.Rev. 201, 232. However, "[n]ationally, there is substantial information now available to show that murderers can be incarcerated and paroled with safety, and that there is no discernible difference in this regard between those who are found guilty of one rather than another kind of criminal homicide." Bedau, Death Sentences in New Jersey, 1909-1960, 19 Rutgers L.Rev. 1, 47 (1964). Commonwealth v. O'Neal, supra, 339 N.E.2d at 686.

Undisputably, the deprivation of a person's right to life is not necessary as the most effective means of protecting society from the offender. As Chief Justice Tauro concluded, "I believe that the Commonwealth's interest in isolation/incapacitation, while vital, can be adequately served by less onerous means." Id.

Since such a drastic step exceeds the legitimate aim of preventing convicted murderers from committing similar violent crimes in the future, an isolation/incapacitation argument fails to carry the contention that the death penalty is valid under Kentucky's constitution.

The final alleged legitimate penal aim served by killing a defendant is that the Commonwealth must ensure justice and promote the stability of society by killing an offender for his crime against society. The Commonwealth will no doubt premise this retribution argument on the assertion that the person assessed with the death penalty has reeked havoc on society by destroying his victim and the victim's family and that without such a penalty society will not be able to express legitimately its moral outrage. Without such a legitimate release, it is argued, the seeds of anarchy, of self help, and of vigilante justice will be sown.

At the outset, it must be remembered that this Court is not called upon to condone the penalized conduct, but simply to determine whether assessing the penalty of death exceeds what is necessary to achieve the retributive aim of this state's homicide statutes.

As discussed supra, a term of imprisonment is deemed appropriate for a defendant who intentionally and horrendously maims, but does not kill, an innocent victim. Never is there a clamor that that defendant must suffer a punishment comparable to the crime to ensure that anarchy will not prevail. Consequently, it seems totally incongruous that any reasonable person could justify the existence of the death penalty on the need to sterilize the seeds of anarchy.

When Furman v. Georgia, supra, was decided, slightly less than half the states had death penalty provisions. History reveals that those states without death penalty statutes were not plagued by episodes of vigilante justice or lynch law. The experiences of the "social laboratories" of the fifty states amply refute the contention that anarchy and vigilante justice will result from the abolition of the death penalty.

It is readily acknowledged that a term of imprisonment satisfies the retributive needs of society for all heinous crimes where a victim's livelihood is severely injured, but not killed. Equally undeniable is that in at least fifteen states throughout this nation, a term of imprisonment likewise satisfies society's moral outrage at the most horrendous crimes including homicides, without leading to the disruption and destruction of order and stabilities in those jurisdictions. In other words retribution for particularly offensive conduct can be and is achieved adequately through measures less drastic than the reprehensible practice of taking a defendant's life.

Obviously, the punishment of death far exceeds what is necessary to achieve the retributive aim of our homicide statutes. As such the need for retribution cannot possibly be used to justify the existence and imposition of death penalty statutes.

From the foregoing it is obvious that the punishment of death goes beyond what is necessary to achieve any legitimate penal aim of our homicide statutes. The deliberate infliction of this atavistic penalty serves no better deterrent than a lesser, more acceptable punishment. The execution of this punishment is not necessary to protect society from convicted murderers; less onerous means are available to serve this purpose as well, perhaps better. Capital punishment, while it may be an expression of society's outrage at particularly offensive conduct, is not needed to prevent the American people from taking the law into their own hands.

Since capital punishment exceeds any legitimate penal aim, it obviously constitutes cruel punishment. Workman v. Commonwealth, supra. Accordingly, the imposition and the carrying out of the penalty of death is proscribed by Section Seventeen of the Constitution of the Commonwealth of Kentucky.

C.

DEATH BY ELECTROCUTION IS CRUEL PUNISHMENT AND THUS INVALID UNDER THE CONSTITUTIONS OF THE UNITED STATES AND THE COMMONWEALTH OF KENTUCKY.

Any person validly convicted of a capital offense in this Commonwealth is killed by the gruesome practice of electrocution. KRS 431.220 specifically provides for this method of extermination:

> Every death sentence shall be executed by causing to pass through the body of the condemned a current of electricity of sufficient intensity to cause death as quickly as possible. The application of the current shall be continued until the condemned is dead.

Appellant submits that death by electrocution is cruel punishment prohibited by the Eighth Amendment to the United States Constitution which forbids cruel and unusual punishments as applied to the states through the Due Process Clause of the Fourteenth Amendment and by Section 17 of the Kentucky Constitution which proscribes the infliction of cruel punishments.

Initially, appellant acknowledges that death by electrocution was upheld by the United States Supreme Court against a constitutional challenge some thirty years ago. Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). However, since the Eighth Amendment "must draw its meaning from the evolving standards that mark the progress of a maturing society" (Gregg v. Georgia, supra, 96 S.Ct. at 2925, citing Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958)), this method of execution must be examined in light of contemporary standards.

Initially it must be remembered that a certain punishment is cruel and thus unconstitutional if it is received today as "inhumane or barbarous treatment or punishment. . .which has become obsolete with the progress of humanitarianism." Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465, 469 (1946).

Of course, it cannot be denied that under any kind of standards, contemporary or otherwise, both "mere torture, however slight" (Gibson v. Commonwealth, 204 Ky. 748, 265 S.W.339, 343 (1924)), and forms of punishment which are unnecessarily cruel (Furman v. Georgia, supra, 408 U.S. at 391-392, per Chief Justice Burger), are proscribed by the constitutional prohibitions against cruel punishment.

Perhaps the most compelling evidence that death by electrocution is inhumane, barbarous, and unnecessarily cruel torture is the detailed description of this type of death drawn by Dr. L. G. V. Rota, a French scientist. First, it must be remembered that no one who is killed by electrocution dies instantly:

> Although I have seen several electric chairs, I have never witnessed an electrocution. Wardens and other noted penologists have told me that it is about as gruesome a procedure as hanging. The body has to be prepared beforehand for the fastening, and one of the pants legs split in order that an electric plate can be placed against the leg. When the executioner throws the switch that sends the electric current through the body, the prisoner cringes from torture, his flesh swells and his skin stretches to a point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases I have been told the eyeballs rest on the cheeks of the condemned. His flesh is burned and smells of cooked meat. When the autopsy is performed the liver is so hot that doctors have said that it cannot be touched by the human hand. Scott, The History of Capital Punishment, 219 (1950).

In light of this description of the gruesome process of electrocution, it is understandable that The Lexington Leader, Lexington's evening newspaper, a regional leader in conservative thought, published an editorial on July 6, 1976, which condemned execution by electrocution in these words:

> The method of imposition is an area in which Kentucky law needs a vast change. We believe that even those convicted and sentenced to death for repulsive crimes should not have to die by a method so archaic as the electric chair.
>
> Surely there is no argument against the gas chamber as the most humane way of carrying out a duty which in reality is repugnant to all.
>
> The electric chair at Eddyville, purchased by the state in 1911 and last used in 1962, is a grotesque instrument. Death by hanging is equally horrible and is associated with a type of justice to which we do not want to return.
>
> We hope that officials and lawmakers see fit to change our statutes so that in the necessity of imposing a death penalty, the gas chamber is used. We think that if there is an iota of dignity left for a person facing the death penalty, it would be best served by the most humane method.

Surely electrocution is "unnecessarily cruel" and causes "undue pain" (see 24B CJS Criminal Law § 1978) since there are available alternatives such as the gas chamber. Electrocution clearly does not comport with modern ideas of humanitarianism; it must be considered a "torture" in today's world.

The United States Supreme Court has recently held that the death penalty is not per se cruel and unusual punishment. Gregg v. Georgia, supra. However, modern society has progressed to the point where it demands that the executions that will be permitted be carried out in the most humane way possible. Death by electrocution as described supra, when judged by contemporary values as shown by the above mentioned editorial, is clearly cruel punishment and therefore invalid under both the United States and Kentucky Constitutions.

CONCLUSION

For the foregoing reasons, appellant submits that his conviction must be reversed.

Respectfully submitted,

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